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No. 08-63

IN THE
Supreme Court of the United States

NATIONAL MINING ASSOCIATION
Petitioners,

v.

DIRK KEMPTHORNE, SECRETARY
OF THE INTERIOR, *et al.*,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for
the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF COAL LESSORS IN SUPPORT OF THE PETITIONERS

ROBERT G. MCLUSKY (WVBN 2489)
JACKSON KELLY PLLC
1600 LAIDLEY TOWER
CHARLESTON, WV 25322
(304) 340-1000
Counsel for the Amicus, National Council of Coal Lessors
Dated: August 14, 2008

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INTEREST OF THE AMICUS[1]

This case presents the question of whether the Secretary of the Interior has impaired state created property rights by his interpretation of a statutory directive to preserve "valid existing rights" ("VER"). As provided by Section 522(e) of the federal Surface Mining Control and Reclamation Act of 1977, the VER preserves the property rights of coal owners in areas where the statute otherwise restricts new coal mining. The National Council of Coal Lessors, Inc., is an organization whose members include companies, trusts, families, and individuals who own coal throughout the United States. The members of the National Council of Coal Lessors (collectively "Amicus") own coal estates recognized by state law. In some instances the coal is owned as part of the land in fee simple absolute, but in most instances, the coal has been severed from the surface estate. Amicus members may sell the coal outright or lease the coal estate to companies in the business of building and operating coal mines in exchange for various forms of consideration, principally a royalty on the coal produced and sold.

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[1] As required by Supreme Court Rule 37.2(a), Counsel of record for all parties received notice no later than 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief. Letters expressing their consent have been filed with the Clerk. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or the counsel made a monetary contribution to its preparation or submission

INTRODUCTION

Coal in the ground is real property and can be held as an interest in real estate separate from the surface. The coal estate can be conveyed separately from the surface, or other minerals. Even separate veins or seams of coal can be conveyed separately from one another. A freehold estate in coal can be created by a grant from the surface owner or by a reservation in a conveyance of the surface. This has been the longstanding and enduring rule under our common law over the past two centuries. *See generally* 3 *Lindley on Mines* § 812 (3d ed. 1914).[2]

A freehold estate in coal carries all the incidents of fee simple ownership and is inheritable, taxable, subject to dower interest at common law, and entitled to separate compensation in the event of condemnation. As a separate and independent estate in land, an interest in coal can be owned or held in any of the estates or lesser interests in which real property in general can be owned or held. With the severance of the coal from the surface, the owner of the coal estate does not lose title, rights or possession by non use, nor does the surface owner acquire title to the coal estate by exclusive and continuous

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[2] *Caldwell v. Fulton*, 31 Pa. 475 (1858); *Marvin v. Brewster Iron Min. Co.*, 10 Sickels (55 N.Y.) 538, (N.Y. 1874); *Wardell v. Watson*, 5 S.W. 605 (Mo. 1887); *Kincaid v. McGowan*, 4 S.W. 802 (Ky. 1887); *Williams v. Gibson*, 4 So. 350 (Ala. 1888); *Ames v. Ames*, 43 N.E. 592 (Ill. 1896); *Gill v. Fletcher*, 78 N.E. 433 (Ohio 1906); *Porter v. Mack Mfg. Co.*, 64 S.E. 853 (W.Va. 1909); *Board of Com'rs of Greene County v. Lattas Creek Coal Co.*, 100 N.E. 561 (Ind. 1913).

occupation of the surface. *See Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919); *Gill v. Fletcher*, 78 N.E. 433, 435 (Ohio 1906). *Crouch v. Puryear, 1 Rand. (22 Va.) 258 (Va. 1822).*

"Practically considered, the grant of coal is the grant of a right to remove it." *Chartiers Block Coal Company v. Mellon*, 25 A. 597, 599 (Pa. 1893). As a consequence, the grant itself conveys all rights to use the surface in such manner and with such means as is fairly necessary for the enjoyment of the coal estate. *See, e.g., Williams v. Gibson*, 4 So. 350, 353 (Ala. 1888); *Squires v. Lafferty*, 121 S.E. 90, 91 (W.Va. 1924). Reasonable uses of the surface include ingress and egress, the right to build roads, mine openings, processing and loading facilities, and other improvements related to the mining, preparation and transportation of the coal. *See, e.g., Wardell v. Watson*, 5 S.W. 605, 606 (Mo. 1887); *Porter v. Mack Manufacturing Co.*, 64 S.E. 853, 855 (W. Va. 1909); *Creasey v. Pyramid Coal Co.*, 61 N.E. 2d 477, 480 (Ind. 1945).

Whether a grant or reservation of the coal estate also carries the right to mine the coal by surface mining methods is a question that has generated various rules of construction under state common law. As a general matter, if the language of the conveyance is explicit it will be given effect. However, if the written instrument is ambiguous the purpose or intent of the parties is determined from the language used in light of the circumstances under which it was written. *See, e.g., Commonwealth v. Fitzmartin*, 102 A. 2d 893, 897 (Pa. 1954); *Dept. of Forests and Parks v. George's Creek Coal & Land Co.*,

242 A. 2d 165, 172 (Md. 1968); *Christman v. Emineth*, 212 N.W. 2d 543, 550 (N.D. 1973); *Skivolocki* v. *E. Ohio Gas Co.*, 313 N.E. 2d 374, 378-379 (Ohio 1974); *Phillips v. Fox*, 458 S.E. 2d 327, 335 (W. Va. 1995).

It is against this backdrop of state property law which Congress legislated when it enacted SMCRA. Both the text and history of SMCRA demonstrate a purposeful design to verify, but not interfere with, the property rights established under state law. Permit applicants submit to the state regulatory authority a statement of the legal documents providing the rights to mine the lands in the permit area. 30 U.S.C. § 1257(a)(9). However, where surface mining is proposed, and the surface and mineral estates has been severed, the state regulatory authority verifies that the applicant possesses rights to surface mine under state law. *Id.* § 1260(b)(6).

The legislative history confirms that "the Act does not tamper with such State [property] laws; all valid existing property rights must be preserved; and [there is] no intention whatsoever, by any provision of this bill, to change such rights." S. Rep. No. 95-128, at 56 (1977). *See* also H.R. Rep. 95-493, at 106 (1977) (right to surface mine determined by applicable State law).

Amicus' members may only convey through any coal lease the property rights and interests they own as part of their coal estate. The property interests and rights in a coal estate consist not only of the right to mine, remove and sell the coal, but also the appurtenant rights to use the surface in such manner and by such means as is necessary to carry on mining

operations. The value of Amicus members' coal and the leases to mine it are extinguished, or severely diminished, without the rights to possess and use the surface in order to mine and remove the coal.

Amicus members' property interests and rights in the coal they own were established prior to enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201 *et seq.*, a law which regulates the mining and reclamation of lands mined for coal. SMCRA also imposes prohibitions on conducting new surface coal mining operations within or nearby certain designated lands or features enumerated at 30 U.S.C. § 1272(e). SMCRA, however, expressly provides that these new restrictions are "subject to valid existing rights." *Id.*

The well established meaning of the term "valid existing rights (VER)," used in numerous other federal laws before and since 1977, includes property interests and rights acquired prior to enactment of a statute that changes the status quo. Here, the Secretary has departed from VER's traditional meaning by preserving only those pre-existing interests and rights that were also accompanied by applications for all permits necessary to open a mine *before* enactment of SMCRA. And, coal owners were not advised of this unusual stipulation until well *after* SMCRA's enactment. See 64 Fed. Reg. 70,776-70,838 (Dec. 17, 1999).

This unprecedented departure from the well established meaning of VER has not merely burdened Amicus members' property rights; it has summarily

extinguished them by rule. To be clear, Amicus members do not maintain that their valid existing rights in coal exempt them or their lessees from SMCRA's permitting, performance and reclamation requirements. Instead, Amicus' interest here is in assuring that its members pre-existing rights to surface mine coal, or use of the surface of coal lands in connection with either surface or underground coal mines as authorized by state law, are preserved. If their coal property interests are not so recognized, then no permits under SMCRA for surface coal mining operations can be granted.

SUMMARY OF ARGUMENT

The Secretary has defined the VER exception to SMCRA's proscriptions on new surface coal mining operations in a manner that destroys rather than preserves pre-existing property rights. Under the Secretary's definition, coal owners must not only possess property rights under state law, they must also have received, or applied for, all permits necessary to mine before the proscriptions take effect in order for their property rights to be saved from the proscriptions on new operations.

The all-permits requirement of the VER definition is contrary to the well-established meaning and purpose of that term to avoid the impairment of valid property rights when Congress enacts new laws. Moreover, neither the text nor the legislative history of SMCRA suggests any intent to graft an all-permits stipulation on to the back end of the well-established meaning of VER.

The Secretary's unorthodox definition of VER lacks textual and structural integrity. The all-permits stipulation detaches VER from its historic underpinnings in property rights. The Secretary now maintains that VER for SMCRA is not intended to preserve property rights, but rather an "equitable interest" in regulatory approval. In short, the Secretary's definition rests upon interpretative legerdemain with the meaning and purpose of VER, and is unworthy of any deference.

In addition to its disregard of a well understood meaning of an oft used term, the Secretary's definition of VER displaces state law. Historically, state law has governed both the substantive property rights held by persons, and how disputes over the meaning of those rights are resolved. The solicitude otherwise exhibited by SMCRA to the states in determining the rights of persons in their property is inexplicably ignored by the Secretary in his use of the "all permits" components of the VER definition.

Finally, the Secretary's choice of a VER definition based upon the attainment of a permit guarantees "significant takings implications" as the Secretary acknowledges. Because reliance on the doctrine of constitutional avoidance would resolve this result, the D.C. Circuit's refusal to employ it was erroneous, as was its conclusion about how and where takings claims would be resolved.

Accordingly, the "all-permits" prong of the Secretary's definition of VER should be vacated.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES GRAVE UNCERTAINTY ABOUT THE MEANING OF A WELL UNDERSTOOD TERM OF ART CONGRESS USES TO PRESERVE EXISTING PROPERTY RIGHTS.

A recurring theme "[t]hroughout SMCRA [is] Congress' express[] concern for preserving existing property rights, and for not interfering with state determinations of those rights." *National Wildlife Federation v. Hodel*, 839 F. 2d 694, 757 (D.C. Cir. 1988). This concern finds its primary expression in the VER exception to Section 522(e)'s proscriptions on new surface coal mining operations. The VER savings clause embodies the statutory intent not "to infringe upon valid property rights." *Id.* at 750. Indeed, the term "valid existing rights" is a familiar one with a well-established purpose and meaning—to preserve property rights and interests previously acquired or earned. *See, e.g., Wilbur v. United States*, 280 U.S. 306, 316-18 (1930); *William v. Brening*, 51 I.D. 225, 226 (1925); *Louis J. Hobbs*, 77 I.D. 5, 7-8 (1970).

The Court of Appeals for the D.C. Circuit searched for ambiguity where none existed in order to save a paradoxical definition of VER that is contrary to both the well-understood meaning and purpose of that term. The ruling allows an agency to convert a familiar term intended to preserve pre-existing property rights into one that extinguishes them. The paradox lies in the two parts of the VER definition

that require coal owners: (1) possess a legally binding deed or lease which vests the right to conduct the type of surface coal mining operations intended (e.g, underground or surface mining); *and* (2) obtain, or apply for, all permits necessary to mine–all before the land overlying their coal estates becomes subject to § 522(e). 30 C.F.R. § 761.5.

The Secretary recognized that coal owners, like Amicus' members, own property rights which satisfy the first part of the VER definition. 64 Fed. Reg. 70,794 ("property rights in the lands listed in section 522(e) are already vested under State law."). And, both the Secretary and D.C. Circuit acknowledge that these property rights are destroyed under the second part of the definition because "few persons will qualify for VER under this standard." Pet. App. 4a quoting 64 Fed. Reg. 70,778.

Consider the fate of the owners of coal estates created before SMCRA's enactment (August 3, 1977), but whose plans to exercise those rights (*i.*e., seek all permits) did not precede SMCRA's designation of the surface as section 522(e) lands:

- *National Forests*: The Secretary of Agriculture acquired vast areas of land under the Weeks Act of 1911, 16 U.S.C. §§ 515 *et seq*., which later were included in the National Forest System. In order to acquire more acreage for less money, the government often purchased only the surface, leaving the mineral estate, including the coal, subject to a reservation held by the grantor. *Bellville Mining Company v. U.S.*, 999 F. 2d 989, 991 (6th Cir. 1993). Section 522(e) prohibits

surface coal mining in National Forests east of the 100th Meridian, and only allows surface activities in connection with underground coal mining if the Secretary determines that the government's economic or other values for those lands are compatible with the coal owner's surface operations. 30 U.S.C. § 1272(e)(2). Coal owners in eastern states who possessed the right to surface mine prior to SMCRA's enactment are stripped of their rights to mine. Coal owners who have the right to conduct underground mining, including using the surface necessary for such operations, must now seek the surface owner's (*i.e.*, the Secretary's) permission to exercise the very rights they reserved when they conveyed the surface to the government.

- *Wilderness Areas*: The same land purchased under the Weeks Act may have later become designated wilderness subject to the Wilderness Act. 30 U.S.C. § 1272(e)(1). *See, e.g., Otter Creek Coal Company*, 224 Ct. Cl. 697 (1980). Surface mining as well as any surface activities associated with underground coal mining are absolutely barred.

- *Occupied Dwellings*: Surface mining activities and surface activities associated with underground mines cannot, absent consent from the dwelling owner, occur within a 300-foot radius around a dwelling (about 7.5 acres for a 1500 square foot dwelling). Owners of the coal estate are forced to reacquire from the owner of the dwelling their rights to surface mine or use the surface for the ancillary activities (e.g., roads,

parking lots for employees, power lines) necessary for either surface or underground coal mining.

A similar fate awaits all owners of coal in the future as well. Should the government acquire the surface overlying their coal for a park, recreational area, or national forest, or designate a historic site, *see, e.g., Ainsley v. United States*, 8 Cl. Ct. 394 (1985), the coal estate beneath the park or forest is lost and its economic value extinguished. Likewise, should a surface owner of land construct a dwelling, or move a mobile home onto the land where the coal estate is separately owned, the coal below is effectively condemned. The Secretary's definition of VER invites, now with judicial approbation, the continual condemnation of Amicus members' property interests.

No other natural resources owners whose property interests are affected by changes to federal land laws are denied the use of their property interests simply because they did not manifest their intent to convert them to economic gain prior to enactment of the new law. Other statutes have withdrawn lands from certain uses, but preserved existing property rights through a VER savings clause. *See*, e.g., Federal Land Policy Management Act of 1976 (FLPMA), Pub. L. 94-579, § 701(h) (codified at 43 U.S.C. § 1701 note); Wilderness Act, 16 U.S.C. § 1133(d); Wild and Scenic Rivers Act, 16 U.S.C. § 1280; Mining in the Parks Act, 16 U.S.C. § 1902. Yet, none those laws have been construed to limit their VER protections to those property owners who had obtained or applied for permits prior to the enactment of the new law. *Skaw v. United States*, 740 F. 2d 932, 940 (Fed. Cir. 1984) (lack of a permit does not defeat property owner's

valid existing rights to mine). *See also The Wilderness Society v. Dombeck*, 168 F. 3d 367, 375 (9th Cir. 1999) (mining claims in Wilderness areas); *Colorado Environmental Coalition v. Bureau of Land Management*, 932 F. Supp. 1247, 1249 (D. Colo. 1996) (oil and gas lease in Wilderness Area).

Valid existing rights, a ubiquitous term of art used in numerous federal laws, is rarely defined in the statute. Neither before nor after this rulemaking has the absence of a definition presented an obstacle to readily ascertain the term's common and well-accepted meaning. It is one grounded in property rights. The Secretary was able to discern VER's meaning in FLPMA, enacted the year before SMCRA, notwithstanding the lack of a definition and "legislative history [which] is largely silent on the scope of this term." *Wilderness Review and Valid Existing Rights*, 88 I.D. 909, 911, (1981). Relying upon the extensive history of the term's interpretation by the Department and the courts, *Id.*, the Secretary concluded that VER saves existing rights and interests from changes made by the new law that "would preclude recognition of the right or . . . would preclude development under the right." *Id.* at 913.

Nor did the meaning of the phrase "subject to valid existing rights" prove elusive to the Secretary in implementing a proclamation issued almost twenty years after SMCRA creating the Grand Staircase-Escalante National Monument. In a decision issued just one month before the SMCRA VER rule, the Secretary interpreted the phrase "subject to valid existing rights" as reflecting the "intention to honor

rights that existed prior to the establishment of the Monument." *Grand Staircase-Escalante National Monument Management Plan*, at 50 (Nov. 1999).[3] For natural resource owners their "activities on existing mineral leases and mining claims will be governed by VERs [which] generally involves rights to explore, develop and produce within the constraints of laws and regulations." *Id.* at 51.[4]

There is no indication in SMCRA that when it comes to the meaning of VER that the past would not be prologue. After all, when Congress uses a term of art with an accumulated settled meaning, it is presumed that Congress intended to incorporate that established meaning. *Morissette v. United States*, 342 U.S. 246, 250 (1952); *National Treasury Employees Union v. Chertoff*, 452 F. 3d 839, 857 (D.C. Cir. 2006).

The panel, however, treats a "term of art" not as a tool for discerning meaning, but rather as an invitation to find ambiguity. Pet. App. 10a ("If VER operates as a term of art . . . it is a tool by which Congress delegates policymaking authority through ambiguity."). This approach to statutory construction can only follow from a dangerous view that *Chevron* and its progeny provide license to skip the traditional

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[3] Available at http://www.ut.blm.gov/monument/docs/planning-NEPA/Monument-Plan/plan.pdf.

[4] This interpretation of VER, which is in accord with its well-established meaning, preserves the property rights in 68 mining claims, 85 oil and gas leases and 18 federal coal leases, *id.* at 51, in a Monument described as an "unspoiled natural area," *id.* at i.

tools—text, structure, purpose and context—and embark upon a journey through definitional possibilities.

Context alone would have served the D.C. Circuit well here. If the absence of the word "property" in the phrase VER gives pause to embracing the term's conventional meaning, Pet. App. 9a-10a, reference to its place in the statute readily instructs that VER's meaning is grounded in "property" rights. Like its antecedents in other federal laws, SMCRA's VER clause appears in a provision that restricts the future use or acquisition of property. With this context as a guide, only the panel's distraction with abstracting a single word—rights—accounts for acceptance of an interpretation that divorces VER from "property." *Compare* Pet. App. 9a ("The word 'right' instead of answering a question, unhelpfully asks another one [] which is equally unhelpful because it requires yet another question.") *With National Wildlife Fed'n*, 899 F.2d at 750 (Section 522(e) VER clause evinces Congress' intent not "to infringe on valid *property* rights." (emphasis supplied)); S. Rep. No. 95-128, at 56 (1977) ("all valid existing *property* rights must be preserved" and there is "no intention whatsoever, by any provision to change such rights.").

Statutory structure further confirms the flaw in the manner the D.C. Circuit deployed *Chevron*. As Petitioner points out, when Congress intended to provide a narrower protection of rights by conditioning them upon attaining regulatory permits, it did so expressly. Pet. 24. Indeed, this structural guidance arises directly from the statutory provision at issue.

Congress provided a focused but narrow protection from the discretionary mining prohibitions of Section 522(a), 30 U.S.C. § 1272(a)(6) by creating a permit based exemption. In comparison the distinct and broader protection—valid existing rights—arises in those instances of the mandatory prohibitions found in § 522(e), *id.* at § 1272(e). Purposefully including of the narrower permit-based exemption in Section 522(a), while excluding it and substituting VER in Section 522(e) should alone disqualify the Secretary's permit-based VER definition as a permissible construction of the statute. *See Russello v. United States*, 464 U.S. 23 (1983).

Contrary to the D.C. Circuit's suggestion, there is nothing "too complicated to understand" when it comes to the meaning of VER. Pet. App. 11a (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527. 545 (1947). Because Section 522(e) was self-executing upon SMCRA's enactment and VER already had a settled meaning in federal law, there is no reason to suppose that Congress left this matter for the agency "in order to find out what it means." *Id.* Rather, Justice Holmes' admonishment is closer to the mark: "The law uses familiar legal expressions in their familiar legal sense." *Henry v. United States*, 251 U.S. 393, 395 (1920). There is no basis for concluding that VER under SMCRA takes on a wholly different meaning than the one that Congress both understood and knew to avoid the impairment of pre-existing property rights when it enacts new laws.

II. THE DECISION AUTHORIZES FEDERAL AGENCIES TO DISPLACE BOTH THE SUBSTANCE AND ROLE OF STATE LAW IN DEFINING PRIVATE PROPERTY RIGHTS

Our federal system leaves to the several States control over property ownership and the rights of its owners in relation to the state or private parties. This Court has consistently held that state law governs in this area especially with respect to real property. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). The decision below conflicts with this venerable principle in terms of both the substantive law that controls and the constitutional sovereignty of the States in determining those rights under their body of statutes and decisions.

SMCRA exhibits special solicitude to States when it comes to the substantive law that governs the legal relationship between coal and surface owners as well as the States' interests in resolving such questions. *See, e.g.*, 30 U.S.C. § 1260(b)(6)("[S]urface-subsurface legal relationships shall be determined in accordance with State law."). Even when it serves as the regulatory authority in a state with privately owned coal, the federal government is barred from adjudicating any property disputes. *Id.* ("[N]othing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes."); *see also id.* § 1257(a)(9).

Prior to the promulgation of the VER regulation, the rights a coal owner possessed in relation to the surface owner were routinely determined pursuant to principles of state common law in state courts. Now superimposed upon state law is a federal test that compels a coal owner – even one, such as Amicus' members, who are not in the business of actually constructing mines – to have acquired all permits necessary to begin mining before those rights are deemed to exist. Because mining permits are not sought until a sufficient market arises to justify production, coal owners do not secure permits for their coal estates as a matter of routine.

Nevertheless, the permit component of the VER test now makes that authorization the only part of the VER definition that possesses meaning. The rights in the property, however ancient or limited by state law, have no value unless, by pure serendipity, they were combined with permit applications before Section 522(e) takes hold. The great body of State law that governs the acquisition, retention and transfer of property, and defines the relative rights of private parties, has been relegated to a secondary and largely formalistic status. In its place is now a federal scheme that gives recognition only to the fortuitous owners who reach the doors of numerous permitting agencies before the surface overlying their coal estates is subjected to the prohibitions imposed by Section 522(e) lands.[5]

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[5] Because the Secretary advised that permit applications were the *sine qua non* for VER two decades after SMCRA's enactment, this federally-sanctioned race to the doors of permitting agencies was over before it began for owners of coal estates under lands with Section 522(e) features when SMCRA was enacted. Even for coal underlying lands presently

It is difficult to conceive of a greater indignity imposed upon state sovereign interests than effectively replacing its substantive law and role over private property rights by a federal regulation promulgated decades after the passage of the statute purporting to sustain sate created rights. SMCRA does not compel such a result and our federal structure cannot accommodate it. This Court should intercede before such mischief gains a foothold and spreads elsewhere.

III. THE D.C. CIRCUIT INCORRECTLY DECLINED TO EMPLOY THE CANON OF CONSTITUTIONAL AVOIDANCE IN ITS ANALYSIS.

The permit-based VER definition assures that the statute and the Takings Clause will clash. The Secretary acknowledged that his interpretation "has significant takings implications," 64 Fed. Reg. 70,827, while the traditional one does not, *id.* at 70,826. No doubt, similar concerns informed this Court's assessment that the 1999 rule's predecessor incorporating an all-permits condition "is not compelled either by the statutory language or its legislative history." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n. 37 (1981).

If there is a time for the canon of constitutional avoidance to be employed it is now. The D.C. Circuit

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unencumbered by Section 522(e) features, the self-executing nature of the provision precludes advance notice that the coal estate is in jeopardy of extinguishment.

thought otherwise, finding no identifiable class of takings victims warranting its use. J.A. 16a. Amicus members' appeared below and fully described how its property interests are extinguished by the rule. And again, the Secretary stipulated in the rulemaking that the rule had significant takings implications. Nevertheless, the panel surmised incorrectly that the rule would have "relatively insignificant takings implications." Pet. App. 16a.

The panel's error was further compounded by its misapprehension of SMCRA's structure. It assumed that any takings implications "can be readily addressed in the Court of Claims." *Id.* Not so. The Secretary's interpretation of VER must be adopted by the states in order for them to maintain their exclusive jurisdiction to regulate coal mining under SMCRA. 30 U.S.C. § 1253(a). And once a state does so, the rule becomes state, not federal, law. *See Pennsylvania Federation of Sportsmen's Club, Inc. v. Hess*, 297 F. 3d 310, 316 (3d Cir. 2002); *Bragg v. West Virginia Coal Association*, 248 F. 3d 275, 295 (4th Cir. 2001). As a consequence, insofar as the proscriptions related to private and state lands described in Section 522(e)(3)-(5), a compensation remedy, if available, will be sought from states in state court—not in the Federal Claims Court under the Tucker Act, 28 U.S.C. § 1491(a), as the D.C. Circuit assumed. *See* Pet. App. 15a.

Of course, if the price to maintain their role as exclusive regulators becomes too steep, states can opt-out of SMCRA. Surely, Congress did not intended to impose these terms on states in choosing whether to assume the responsibility for

implementing SMCRA. *See* 30 U.S.C. § 1201(f). Because SMCRA vests the D.C. Circuit with exclusive jurisdiction to review national rules like this one, 30 U.S.C. § 1276(a)(1), absent this Court's review, the ruling below could inflict permanent harm to SMCRA's federalism design.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT G. MCLUSKY, (WVBN 2489)
JACKSON KELLY PLLC
1600 Laidley Tower
Charleston, WV 25523
(304) 340-1000
Counsel for *Amicus Curiae*,
National Council of Coal Lessors, Inc.